89

No. (1)

Supreme Court, U.S.
FILED
071273 APR 7 - 2008
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JAMES DOMINIC DELFINO AND
JEANIENE ANN DELFINO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The Fourth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

WILLIAM MALLORY KENT
Counsel for Petitioners
Florida Bar No. 0260738
1932 Perry Place
Jacksonville, Florida 32207
(904) 398-8000 Telephone
(904) 348-3124 Fax
kent@williamkent.com Email
williamkent.com Webpage

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

WHETHER THE DISTRICT COURT ERRED IN DETERMINING THE TAX LOSS AMOUNT FOR SENTENCING PURPOSES WHEN THE DISTRICT COURT REFUSED TO MAKE A DETERMINATION OF THE ACTUAL TAX LOSS BY APPLYING DEDUCTIONS THE TAXPAYERS WOULD HAVE BEEN ENTITLED TO AND WERE READY TO PROVE.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
OPINION BELOW	1
JURISDICTION	1
UNITED STATES SENTENCING GUIDELINE PROVISIONS INVOLVED	2
STATUTORY PROVISIONS INVOLVED	13
STATEMENT OF FACTS MATERIAL TO THE QUESTION PRESENTED	14
ARGUMENTS IN SUPPORT OF GRANTING THE WRIT	19
WHETHER THE DISTRICT COURT ERRED IN DETERMINING THE TAX LOSS AMOUNT FOR SENTENCING PURPOSES WHEN THE DISTRICT COURT REFUSED TO MAKE A DETERMINATION OF THE ACTUAL TAX LOSS BY APPLYING DEDUCTIONS THE TAXPAYERS WOULD HAVE BEEN ENTITLED TO	19
A. THE FOURTH CIRCUIT HAS MISAPPLIED THE FEDERAL SENTENCING GUIDELINES IN DETERMINING TAX LOSS UNDER U.S.S.G. § 2T1.1	19
B. CERTIORARI SHOULD BE GRANTED BECAUSE THIS IS A RECURRING PROBLEM	26

TABLE OF CONTENTS – Continued

Page

C. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE SPLIT IN THE CIRCUITS ON THIS QUESTION 27

CONCLUSION 31

APPENDIX

Fourth Circuit Court Of Appeals Published Opinion ..... App. 1

Fourth Circuit Court Of Appeals Denial Of Petition For Rehearing ..... App. 14

TABLE OF AUTHORITIES

Page

CASES

Everson v. United States, 108 F.3d 234 (9th Cir. 1997) 28

Stinson v. United States, 508 U.S. 36, 113 S.Ct. 1913 (1993) 24

United States v. Bishop, 291 F.3d 1100 (9th Cir. 2002) 28, 29

United States v. Chavin, 316 F.3d 666 (7th Cir. 2002) 29, 30

United States v. Delfino, 510 F.3d 468 (4th Cir. 2007) 1, 18

United States v. Gordon, 291 F.3d 181 (2nd Cir. 2002) 25, 28, 30

United States v. Maali, No. 6:02-CR-171, 2005 WL 2204982 (M.D. Fla. Sept. 8, 2005) 27

United States v. Martinez-Rios, 143 F.3d 662 (2nd Cir. 1998) 24, 27

United States v. Montano, 250 F.3d 709 (9th Cir. 2001) 29

United States v. Schmidt, 935 F.2d 1440 (4th Cir. 1991) 22

United States v. Spencer, 178 F.3d 1365 (10th Cir. 1999) 30

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Title 18, U.S.C. § 371 ..... 13, 14

Title 26, U.S.C. § 7201 ..... 13, 15, 16

Title 28, U.S.C. § 1254(1) 1

GUIDELINE PROVISIONS

U.S.S.G. § 2T1.1 25

U.S.S.G. § 2T1.1(a)(1) 16, 20, 24

U.S.S.G. § 2T1.1(b)(2) 17, 25

U.S.S.G. § 2T1.1(c) 30

U.S.S.G. § 2T1.1(c)(2) 23, 28

U.S.S.G. § 2T1.1(c)(2), com. n. (A) 23

U.S.S.G. § 2T1.3(a) 22

U.S.S.G. § 2T4.1(H) 17, 21

U.S.S.G. § 6A1.2(b) 26

OTHER AUTHORITIES

United States Sentencing Commission Statistical Information Packet, Fiscal Year 2006, Table 1 27

United States Sentencing Commission, Final Quarterly Data Report, Fiscal Year 2007, Table 3 26

PETITION FOR A WRIT OF CERTIORARI

The Petitioners, **JAMES DOMINIC DELFINO** and **JEANIENE ANN DELFINO**, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in *United States v. James Dominic Delfino and Jeaniene Ann Delfino,* filed December 18, 2007. The decision of the Fourth Circuit is reported at *United States v. Delfino*, 510 F.3d 468 (4th Cir. 2007) and a true and correct copy is included in Appendix A, *infra*.

OPINION BELOW

The decision of the Fourth Circuit is reported at *United States v. Delfino*, 510 F.3d 468 (4th Cir. 2007).

JURISDICTION

This Petition seeks review of the judgment entered by the United States Court of Appeals for the Fourth Circuit on December 18, 2007, in *United States v. Delfino*, 510 F.3d 468 (4th Cir. 2007). The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Fourth Circuit is invoked under Title 28, United States Code § 1254(1).

UNITED STATES SENTENCING GUIDELINE PROVISIONS INVOLVED

2005 Federal Sentencing Guidelines

Chapter 2 - PART T - OFFENSES INVOLVING TAXATION

§ 2T1.1. Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents

(a) Base Offense Level:

(1) Level from § 2T4.1 (Tax Table) corresponding to the tax loss; or

(2) 6, if there is no tax loss.

(b) Specific Offense Characteristics

(1) If the defendant failed to report or to correctly identify the source of income exceeding $10,000 in any year from criminal activity, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(2) If the offense involved sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(c) Special Instructions

For the purposes of this guideline –

(1) If the offense involved tax evasion or a fraudulent or false return, statement, or other document, the tax loss is the total amount of loss that was the object of the offense (i.e., the loss that would have resulted had the offense been successfully completed).

Notes:

(A) If the offense involved filing a tax return in which gross income was underreported, the tax loss shall be treated as equal to 28% of the unreported gross income (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against tax, unless a more accurate determination of the tax loss can be made.

(B) If the offense involved improperly claiming a deduction or an exemption, the tax loss shall be treated as equal to 28% of the amount of the improperly claimed deduction or exemption (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against tax, unless a more accurate determination of the tax loss can be made.

(C) If the offense involved improperly claiming a deduction to provide a basis for tax evasion in the future, the tax loss shall be treated as equal to 28% of the amount of the improperly claimed deduction (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against tax, unless a

more accurate determination of the tax loss can be made.

(D) If the offense involved (i) conduct described in subdivision (A), (B), or (C) of these Notes; and (ii) both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses added together.

(2) If the offense involved failure to file a tax return, the tax loss is the amount of tax that the taxpayer owed and did not pay.

Notes:

(A) If the offense involved failure to file a tax return, the tax loss shall be treated as equal to 20% of the gross income (25% if the taxpayer is a corporation) less any tax withheld or otherwise paid, unless a more accurate determination of the tax loss can be made.

(B) If the offense involved (i) conduct described in subdivision (A) of these Notes; and (ii) both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses added together.

(3) If the offense involved willful failure to pay tax, the tax loss is the amount of tax that the taxpayer owed and did not pay.

(4) If the offense involved improperly claiming a refund to which the claimant was not entitled, the tax loss is the amount of the claimed refund to which the claimant was not entitled.

(5) The tax loss is not reduced by any payment of the tax subsequent to the commission of the offense.

Commentary

Statutory Provisions: 26 U.S.C. §§ 7201, 7203 (other than a violation based upon 26 U.S.C. § 6050I), 7206 (other than a violation based upon 26 U.S.C. § 6050I or § 7206(2)), and 7207. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. "Tax loss" is defined in subsection (c). The tax loss does not include interest or penalties, except in willful evasion of payment cases under 26 U.S.C. § 7201 and willful failure to pay cases under 26 U.S.C. § 7203. Although the definition of tax loss corresponds to what is commonly called the "criminal figures," its amount is to be determined by the same rules applicable in determining any other sentencing factor. In some instances, such as when indirect methods of proof are used, the amount of the tax loss may be uncertain; the guidelines contemplate that the court will simply make a reasonable estimate based on the available facts.

Notes under subsections (c)(1) and (c)(2) address certain situations in income tax cases in which the tax loss may not be reasonably ascertainable. In these situations, the "presumptions" set forth are to be used unless

the government or defense provides sufficient information for a more accurate assessment of the tax loss. In cases involving other types of taxes, the presumptions in the notes under subsections (c)(1) and (c)(2) do not apply.

Example 1: A defendant files a tax return reporting income of $40,000 when his income was actually $90,000. Under Note (A) to subsection (c)(1), the tax loss is treated as $14,000 ($90,000 of actual gross income minus $40,000 of reported gross income = $50,000 x 28%) unless sufficient information is available to make a more accurate assessment of the tax loss.

Example 2: A defendant files a tax return reporting income of $60,000 when his income was actually $130,000. In addition, the defendant claims $10,000 in false tax credits. Under Note (A) to subsection (c)(1), the tax loss is treated as $29,600 ($130,000 of actual gross income minus $60,000 of reported gross income = $70,000 x 28% = $19,600, plus $10,000 of false tax credits) unless sufficient information is available to make a more accurate assessment of the tax loss.

Example 3: A defendant fails to file a tax return for a year in which his salary was $24,000, and $2,600 in income tax was withheld by his employer. Under the note to subsection (c)(2), the tax loss is treated as $2,200 ($24,000 of gross income x 20% = $4,800, minus $2,600 of tax withheld) unless sufficient

information is available to make a more accurate assessment of the tax loss.

In determining the tax loss attributable to the offense, the court should use as many methods set forth in subsection (c) and this commentary as are necessary given the circumstances of the particular case. If none of the methods of determining the tax loss set forth fit the circumstances of the particular case, the court should use any method of determining the tax loss that appears appropriate to reasonably calculate the loss that would have resulted had the offense been successfully completed.

2. In determining the total tax loss attributable to the offense (see § 1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated. The following examples are illustrative of conduct that is part of the same course of conduct or common scheme or plan: (a) there is a continuing pattern of violations of the tax laws by the defendant; (b) the defendant uses a consistent method to evade or camouflage income, e.g., backdating documents or using off-shore accounts; (c) the violations involve the same or a related series of transactions; (d) the violation in each instance involves a false or inflated claim of a similar deduction or credit; and (e) the violation in each instance involves a failure to report or an understatement of a

specific source of income, e.g., interest from savings accounts or income from a particular business activity. These examples are not intended to be exhaustive.

3. "Criminal activity" means any conduct constituting a criminal offense under federal, state, local, or foreign law.

4. Sophisticated Means Enhancement. – For purposes of subsection (b)(2), "sophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts ordinarily indicates sophisticated means.

5. A "credit claimed against tax" is an item that reduces the amount of tax directly. In contrast, a "deduction" is an item that reduces the amount of taxable income.

6. "Gross income," for the purposes of this section, has the same meaning as it has in 26 U.S.C. § 61 and 26 C.F.R. § 1.61.

7. If the offense involved both individual and corporate tax returns, the tax loss is the aggregate tax loss from the individual tax offense and the corporate tax offense added together. Accordingly, in a case in which a defendant fails to report income derived from a corporation on both the defendant's individual tax return and the defendant's corporate

tax return, the tax loss is the sum of (A) the unreported or diverted amount multiplied by (i) 28%; or (ii) the tax rate for the individual tax offense, if sufficient information is available to make a more accurate assessment of that tax rate; and (B) the unreported or diverted amount multiplied by (i) 34%; or (ii) the tax rate for the corporate tax offense, if sufficient information is available to make a more accurate assessment of that tax rate. For example, the defendant, the sole owner of a Subchapter C corporation, fraudulently understates the corporation's income in the amount of $100,000 on the corporation's tax return, diverts the funds to the defendant's own use, and does not report these funds on the defendant's individual tax return. For purposes of this example, assume the use of 34% with respect to the corporate tax loss and the use of 28% with respect to the individual tax loss. The tax loss attributable to the defendant's corporate tax return is $34,000 ($100,000 multiplied by 34%). The tax loss attributable to the defendant's individual tax return is $28,000 ($100,000 multiplied by 28%). The tax loss for the offenses are added together to equal $62,000 ($34,000 + $28,000).

Background: This guideline relies most heavily on the amount of loss that was the object of the offense. Tax offenses, in and of themselves, are serious offenses; however, a greater tax loss is obviously more harmful to the treasury and more serious than a smaller one with otherwise similar characteristics.

Furthermore, as the potential benefit from the offense increases, the sanction necessary to deter also increases.

Under pre-guidelines practice, roughly half of all tax evaders were sentenced to probation without imprisonment, while the other half received sentences that required them to serve an average prison term of twelve months. This guideline is intended to reduce disparity in sentencing for tax offenses and to somewhat increase average sentence length. As a result, the number of purely probationary sentences will be reduced. The Commission believes that any additional costs of imprisonment that may be incurred as a result of the increase in the average term of imprisonment for tax offenses are inconsequential in relation to the potential increase in revenue. According to estimates current at the time this guideline was originally developed (1987), income taxes are underpaid by approximately $90 billion annually. Guideline sentences should result in small increases in the average length of imprisonment for most tax cases that involve less than $100,000 in tax loss. The increase is expected to be somewhat larger for cases involving more taxes.

Failure to report criminally derived income is included as a factor for deterrence purposes. Criminally derived income is generally difficult to establish, so that the tax loss in such cases will tend to be substantially understated. An enhancement for offenders who

violate the tax laws as part of a pattern of criminal activity from which they derive a substantial portion of their income also serves to implement the mandate of 28 U.S.C. § 994(i)(2).

Although tax offenses always involve some planning, unusually sophisticated efforts to conceal the offense decrease the likelihood of detection and therefore warrant an additional sanction for deterrence purposes.

The guideline does not make a distinction for an employee who prepares fraudulent returns on behalf of his employer. The adjustments in Chapter Three, Part B (Role in the Offense) should be used to make appropriate distinctions.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 219-223); November 1, 1990 (see Appendix C, amendment 343); November 1, 1992 (see Appendix C, amendment 468); November 1, 1993 (see Appendix C, amendment 491); November 1, 1998 (see Appendix C, amendment 577); November 1, 2001 (see Appendix C, amendment 617); November 1, 2002 (see Appendix C, amendment 646).

2005 Federal Sentencing Guidelines

Chapter 2 – PART T – OFFENSES INVOLVING TAXATION

§ 2T4.1. Tax Table

Tax Loss (Apply the Greatest)		Offense Level
(A)	$2,000 or less	6
(B)	More than $2,000	8
(C)	More than $5,000	10
(D)	More than $12,500	12
(E)	More than $30,000	14
(F)	More than $80,000	16
(G)	More than $200,000	18
(H)	More than $400,000	20
(I)	More than $1,000,000	22
(J)	More than $2,500,000	24
(K)	More than $7,000,000	26
(L)	More than $20,000,000	28
(M)	More than $50,000,000	30
(N)	More than $100,000,000	32
(O)	More than $200,000,000	34
(P)	More than $400,000,000	36.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 237); November 1, 1993 (see Appendix C, amendment 491); November 1, 2001 (see Appendix C, amendment 617); January 25, 2003 (see Appendix C, amendment 647); November 1, 2003 (see Appendix C, 653).

STATUTORY PROVISIONS INVOLVED

26 U.S.C. § 7201. Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy,

each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

STATEMENT OF FACTS MATERIAL TO THE QUESTION PRESENTED[1]

James Dominic and Jeaniene Ann Delfino (collectively "the Delfinos" and individually "Mr. Delfino" or "Mrs. Delfino"), husband and wife, were charged and proceeded to trial on a four count superseding indictment filed May 17, 2005 [R2].

Count One – Conspiracy

Count one charged the Delfinos with conspiracy under 18 U.S.C. § 371, beginning on or about 1995 and continuing to the date of the indictment [May 17, 2005], the criminal object of which impede, impair obstruct and defeat the lawful government function of the Internal Revenue Service ("IRS") in the ascertainment, computation, assessment, and collection of revenue, that is, the Delfinos's 1995, 1996, 1997,

[1] Bracketed references are to the record on appeal at the Fourth Circuit Court of Appeals.

1998, 1999, 2000 and 2001 income taxes. Count one charged as the manner and means, attempts to conceal their assets and their ability to pay, by causing their assets and income to be placed in the names of others (nominees), to prevent the IRS from accurately assessing taxes due and owing. Count one alleged 24 overt acts. The first overt act alleged that the Delfinos had their income paid to them through two trusts that they controlled, Alpha & Omega Trust and Covenant Foundation Trust during the tax years 1995 through 2001. Overt acts 2-24 alleged various acts occurring between 1995 and 2002. [R2].

Count Two – Tax Evasion re Mr. Delfino's Taxes 1995-1997

Count two charged the Delfinos with tax evasion under 26 U.S.C. § 7201 for wilfully attempting to evade and defeat a large part of the income tax, penalties and interest due and owing by *Mr. Delfino* for the calendar years 1995, 1996 and 1997 by concealing and attempting to conceal the nature and extent of his true and correct assets and his ability to pay income tax. Twelve affirmative acts are charged in support of count three, with dates ranging from 1995 to 2002. [R2].

Count Three – Tax Evasion re Mrs. Delfino's Taxes 1995-1997

Count three charged the Delfinos with tax evasion under 26 U.S.C. § 7201 for wilfully attempting to

evade and defeat a large part of the income tax, penalties and interest due and owing by *Mrs. Delfino* for the calendar years 1995, 1996 and 1997 by concealing and attempting to conceal the nature and extent of her true and correct assets and his ability to pay income tax.[2] Three affirmative acts are charged in support of count three, one in 1995, one in 2002 and one in 2004. [R2]

Verdict

After approximately 6 hours 20 minutes of deliberations over two days, the jury returned guilty verdicts on all counts as to both Mr. and Mrs. Delfino.[3] [R103; R104; R105; R106]

Sentencing

The presentence investigation report ("PSR") for both Delfinos established the base offense level for the controlling tax counts at level 24 pursuant to U.S.S.G. § 2T1.1(a)(1) based on a tax loss amount of $4,717,218.22. [PSR p. 8 and Worksheet A] It was the defendants' position that the guideline range should have been that based on a tax loss equal to "the

---

[2] Counts two and three do not set forth the statute under which the charge was based, but the caption of the indictment indicates that counts two and three were filed under 26 U.S.C. § 7201.

[3] A fourth count charged mail fraud but it is not pertinent to this petition.

400,000 to 1 million, which I submit is the appropriate amount . . . " Under U.S.S.G. § 2T4.1(H), this would be a base level 20. [T4/27/2006; p. 91] Had the Delfinos' position been accepted, the base offense level would have been level 20, instead of the base level 24 in the PSR. [T4/27/2006; p. 91] The District Court overruled the defense objection to the tax loss amount. [T4/27/2006; pp. 100-101; pp. 121-124] Had the Delfino's objection been sustained, the total offense level would have been 22, criminal history category I, for a sentencing range of 41-51 months, instead of the 63-78 months determined by the District Court.[4]

James Delfino was sentenced April 27, 2006 to 78 months imprisonment structured as follows: 60 months concurrent on each of counts one, three and four and a term of 60 months on count two, 18 months of which is to run consecutive to count one. [T4/27/06; p. 132] Mr. Delfino was sentenced to three years supervised release on all four counts to run concurrent, to commence upon release from imprisonment. Mr. Delfino was ordered to make immediate payment of $2,827,564.76 tax liability to the IRS of which $379,995.45 was joint and several liability with Mrs. Delfino. [T4/27/06; p. 134]

---

[4] The base offense level was increased two additional levels for use of sophisticated means under U.S.S.G. § 2T1.1(b)(2).

Jeaniene Delfino was sentenced April 27, 2006 to 63 months imprisonment structured as follows: 60 months concurrent on each of counts one, three and four and a term of 60 months on count two, 3 months of which is to run consecutive to count one. [T4/27/06; p. 137] Mrs. Delfino was sentenced to three years supervised release on all four counts to run concurrent, to commence upon release from imprisonment. Mrs. Delfino was ordered to make immediate payment of $2,137,084.78 tax liability to the IRS of which $379,995.45 was joint and several liability with Mr. Delfino. [T4/27/06; p. 139]

The Delfinos appealed their judgments and sentences to the Fourth Circuit Court of Appeals raising the issue presented in this petition. The Fourth Circuit Court of Appeals affirmed the judgments and sentences after oral argument in a published decision, *United States v. Delfino*, 510 F.3d 468 (4th Cir. 2007). The Delfinos petitioned for rehearing and rehearing *en banc* January 2, 2008, and rehearing and rehearing *en banc* was summarily denied January 15, 2008.

ARGUMENTS IN SUPPORT OF GRANTING THE WRIT

WHETHER THE DISTRICT COURT ERRED IN DETERMINING THE TAX LOSS AMOUNT FOR SENTENCING PURPOSES WHEN THE DISTRICT COURT REFUSED TO MAKE A DETERMINATION OF THE ACTUAL TAX LOSS BY APPLYING DEDUCTIONS THE TAXPAYERS WOULD HAVE BEEN ENTITLED TO.

A. THE FOURTH CIRCUIT HAS MISAPPLIED THE FEDERAL SENTENCING GUIDELINES IN DETERMINING TAX LOSS UNDER U.S.S.G. § 2T1.1.

In order to establish the "substantial income tax" element of the tax evasion counts at trial, the government relied primarily upon the testimony of former IRS auditor John Gordon. [*See* T 1/24/06; pp. 54-55] Mr. Gordon testified that he conducted an audit in order to determine the taxes owed by Mr. Delfino for the tax years 1995-1997 and determined that Mr. Delfino owed $321,659 for 1995, $395,906 for 1996 and $119,233 for 1997. *Id.* at 88. Significantly, however, Mr. Gordon's audit was based only upon the *deposits* into accounts allegedly controlled by Mr. Delfino. *Id.* at 79 ("I used the total of those deposits to be their income."). Moreover, Mr. Gordon's audit did *not* credit Mr. Delfino with most deductions for 1995 and it did not credit him with any deductions for 1996 and 1997 although Mr. Gordon was confident that such deductions existed. *Id.* at 78 ("I disallowed all the deductions because there was no support for those

deductions."); 79 ("I'm pretty confident there probably would have been deductions."); 81. Indeed, Mr. Gordon conceded on cross-examination that the figures he presented to the jury did "not accurately reflect[ ] the tax that [the Delfinos] would owe on that. . . ." *Id.* at 92.

Despite the fact that Mr. Gordon subpoenaed bank records, he limited his subpoena to those records relating to deposits even though he could have requested records related to withdrawals in order to determine deductions to taxable income. *Id.* at 101. He also did not review Alpha & Omega's Quickbooks files or any other documents seized from the Delfino's home and apply any deductions that would have been determinable from those records. *Id.* at 102.[5]

The PSR in turn based its determination of the "tax loss" for purposes of application of the sentencing guidelines on this trial evidence without any effort being made to make a more accurate determination of the tax loss. Using the deposit method of determining tax liability, the District Court established the base offense level for the controlling tax counts at level 24 pursuant to U.S.S.G. § 2T1.1(a)(1) based on a tax loss amount of $4,717,218.22. [PSR p. 8 and Worksheet A]

---

[5] As part of the seizure, the Government seized: numerous bank records and canceled checks, business receipts, financial records as well as Alpha & Omega's Quickbooks file. *See* Attachment A (Inventory Listing of All Items Seized at Search Warrant Site).

This was the IRS's estimate of tax loss without giving the Delfinos the benefit of deductions from income that they would have been entitled to had they filed proper tax returns.

The Delfinos objected at sentencing arguing that they were prepared to establish their proper deductions and thereby allow the Court to determine their actual tax liability. It was the defendants' position that the District Court must calculate the tax loss figure for purposes of application of the federal sentencing guidelines by allowing the defendants proper credit for deductions from income. [T4/27/2006; pp. 89-100] The Delfinos offered to establish their deductions at sentencing, but the District Court determined that such a fact finding was not required under its understanding of the application of the guidelines.

Had the Delfinos' position been accepted, they proffered that the correct base offense level would have been level 20, instead of the base level 24 in the PSR, a four level difference. [T4/27/2006; p. 91][6]

The Delfinos argued that binding precedent from the Fourth Circuit required the District Court to attempt an accurate determination of the actual tax loss and not simply rely upon an objected to estimate

---

[6] Mr. Delfino's counsel stated that the guideline range should be that based on a tax loss equal to "the 400,000 to 1 million, which I submit is the appropriate amount . . . " Under U.S.S.G. § 2T4.1(H), this would be a base level 20. [T4/27/2006; p. 91]

that clearly did not reflect the true tax liability. The Delfinos cited *United States v. Schmidt*, 935 F.2d 1440, 1451 (4th Cir. 1991). In *Schmidt* this Court held:

> With such policy as backdrop, the government has urged that 1) to allow appellants to offset understated individual income with falsely claimed, largely untaxed trust income would give an undue degree of approval to the very scheme for which they were convicted and 2) to treat income reported by UBO investors on trust returns as if it had been correctly reported on individual returns would thus subvert the deterrent purpose of the Guidelines set out above.
>
> The choice before us is thus between punishing a crime whose gravity is represented by the actual loss of tax revenue to the IRS and one whose gravity is represented by the full extent of participation in a tax evasion scheme regardless of the tax consequences to the government. A fair reading of Section 2T1.3(a) supports only the former. The government simply is not suffering a "tax loss" merely because the taxpayer reports his income on a trust return rather than an individual return. Certainly such a theory would die of its own weight the minute the Service attempted to collect its "loss" by asserting a claim to all of the income reported on the trust tax returns. In our view, then, the understated gross income here is represented only by non-legitimate deductions and any income "distributed" off-shore to FSBL. We

> remand the case for a recalculation of all of the appellants' base offense levels consistent with our view of the *actual* tax loss sustained by the government.

The District Court noted *Schmidt* appeared to require the application of the method argued by the Delfinos, nevertheless, the District Court treated the gross income of the Delfinos without benefit of any claimed offsetting deductions, as the tax loss for guideline purposes. [T4/27/2006; pp. 100-101; pp. 121-124]

The District Court suggested and the Fourth Circuit agreed that *Schmidt* was no longer controlling authority in light of a subsequent amendment to the guidelines, but the Delfinos rightly argued that the amendment the Court noted, if anything, reinforced their position. Indeed, U.S.S.G. § 2T1.1(c)(2) of the November 2005 version of the guideline manual applied by the District Court, expressly requires "[i]f the offense involved failure to file a tax return, the tax loss *is the amount of tax that the taxpayer owed and did not pay*." U.S.S.G. § 2T1.1(c)(2), comm. n. A instructs the Court is to treat the amount owed as 20% of the gross income *unless a more accurate determination of the tax loss can be made*:

> (A) If the offense involved failure to file a tax return, the tax loss shall be treated as equal to 20% of the gross income (25% if the taxpayer is a corporation) less any tax withheld or otherwise paid, unless a more

> accurate determination of the tax loss can be made.

This direction from the Sentencing Commission cannot simply be ignored. Indeed, Sentencing Commission commentary is binding on the court unless it is inconsistent with the guideline. *Stinson v. United States*, 508 U.S. 36, 113 S.Ct. 1913 (1993) (Commentary in sentencing guidelines manual that interprets or explains the guideline is authoritative unless it violates the Constitution or the authorizing federal statute or is inconsistent with or a plainly erroneous reading of that guideline.)

See also United States v. Martinez-Rios, 143 F.3d 662, 671 (2nd Cir. 1998), which stated in *dicta*:

> In contrast, the 1995 Guidelines, which were in effect at the time of sentencing, do not foreclose consideration of legitimate but unclaimed deductions. The 1995 version of section 2T1.1 defines "tax loss" as "the total amount of loss that was the object of the offense (*i.e.*, the loss that would have resulted had the offense been successfully completed)." U.S.S.G. § 2T1.1(c)(1) (1995). The Guideline provides, in pertinent part:
>
> > If the offense involved filing a tax return in which gross income was underreported, the tax loss shall be treated as equal to 28% of the unreported gross income (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against

> tax, *unless a more accurate determination can be made.*
>
> *Id.* § 2T1.1(c)(1)(A) (emphasis added) (1995). Under this Guideline, the sentencing court need not base its tax loss calculation on gross unreported income if it can make "a more accurate determination" of the intended loss and that determination of the tax loss involves giving the defendant the benefit of legitimate but unclaimed deductions.

accord, *United States v. Gordon*, 291 F.3d 181, 187-188 (2nd Cir. 2002) (agreeing that deductions should be determined in calculating tax loss for § 2T1.1, but finding error harmless on facts of case).

Had the Delfino's objection been sustained, the total offense level would have been 22, criminal history category I, for a sentencing range of 41-51 months, instead of the 63-78 months determined by the District Court.[7] The District Court erred in overruling the Delfinos' objection and the error prejudiced the Delfinos because it increased the advisory guideline by 22 months at the low end and 27 months at the high end, and each of the Delfinos was sentenced within the advisory guideline range as erroneously determined by the District Court.

---

[7] The base offense level was increased two additional levels for use of sophisticated means under U.S.S.G § 2T1.1(b)(2).

The Fourth Circuit should have vacated the Delfinos' sentencing package in its entirety for resentencing with instructions on remand that the District Court accurately determine the actual tax loss based on the deductions that can be established by the Delfinos at the sentencing hearing.[8] It erred in not doing so. This Court should grant certiorari to establish the proper standard for determining tax loss under U.S.S.G. § 2T1.1 as set forth in Delfinos' argument above.

B. CERTIORARI SHOULD BE GRANTED BECAUSE THIS IS A RECURRING PROBLEM.

The determination of tax loss for sentencing guideline purposes is a recurring problem before the United States District Courts. According to statistics published by the United States Sentencing Commission, in Fiscal Year 2007 (the most recent complete year for which statistics are available), there were 627 tax cases sentenced in United States District Courts nationwide. *United States Sentencing Commission, Final Quarterly Data Report*, Fiscal Year

---

[8] As a practical matter what would be anticipated is that the parties would resolve the objection prior to resentencing by way of the objection resolution procedure of U.S.S.G. § 6A1.2(b) once the probation office and lower court were properly instructed on the procedure to be followed in determining tax loss and little if any further time of the District Court need be spent in determining the actual tax due.

2007, Table 3, found at http://www.ussc.gov/sc_cases/Quarter_Report_Final_07.pdf. This is an increase over the year before when 608 tax cases were sentenced nationwide. *United States Sentencing Commission Statistical Information Packet,* Fiscal Year 2006, Table 1, found at http://www.ussc.gov/JUDPACK/2006/4c06.pdf.

C. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE SPLIT IN THE CIRCUITS ON THIS QUESTION.

There is a split in the Circuits on the issue presented by this petition. In *United States v. Martinez-Rios,* 143 F.3d 662, 671 (2d Cir. 1998), the Second Circuit concluded that a sentencing court need not base its determination of tax loss on gross unreported income if it can make "a more accurate determination of the intended loss," a determination which "involves giving the defendant the benefit of legitimate but unclaimed deductions." The Second Circuit explained that, prior to the 1993 amendments to § 2T1.1, a court was precluded from giving a defendant credit for legitimate, but unclaimed, deductions.[9] *Id.* In the Second Circuit, allowing such deductions under the amended version of the guidelines is appropriate because the amended version of the guideline provides

---

[9] *See also United States v. Maali,* No. 6:02-CR-171, 2005 WL 2204982 (M.D. Fla. Sept. 8, 2005) ("the very definition of 'loss' contemplates the consideration of unclaimed deductions").

for harsher penalties. *Id.* Subsequently, in *United States v. Gordon*, 291 F.3d 181, 187 (2d Cir. 2002), the Second Circuit explained that "tax loss" under § 2T1.1 "is intended to reflect the revenue loss to the government from the defendant's behavior."[10]

---

[10] The Ninth Circuit in *United States v. Bishop*, 291 F.3d 1100, 1115-1116 (9th Cir. 2002), appears to permit the taxpayer to establish his deductions at sentencing in order to determine a more accurate tax loss if the taxpayer assumes the burden to do so (as the Delfinos did in this case), but in the *Bishop* case agreed with the Government that it was not the Government's burden to prove the taxpayer's deductions, and given that the taxpayer did not present any evidence of his claimed deductions at sentencing, the district court did not err in refusing to place the burden on the Government to do so:

> Cardenaz claims that the district court also erred in accepting the government's calculation of tax loss because it did not itemize the deductions to which defendants were entitled in 1993 and 1994. According to Cardenaz, because the government's calculation used the standard deduction, the calculation was not a "more accurate determination" of tax loss than the default 20% of gross income set forth in U.S.S.G. § 2T1.1(c)(2) cmt. n. A (2002); therefore, the district court should have used the default. The government argues that the sentencing court need "simply make a reasonable estimate based on the available facts," see U.S.S.G. § 2T1.1, cmt. n. 1, and that the "available facts" in this case did not include any information on itemized deductions. Furthermore, Cardenaz did not offer such information at the time of sentencing. The government points out that "deductions are a matter of legislative grace, and taxpayers bear the burden of proving entitlement to any deductions claimed." *Everson v. United States*, 108 F.3d 234, 236 (9th Cir. 1997) (citation omitted). Cardenaz counters that even if

(Continued on following page)

The Seventh and Tenth Circuit Courts of Appeals have rejected the Second Circuit's approach to determination of tax loss. In *United States v. Chavin,* 316 F.3d 666, 669 (7th Cir. 2002), the defendant was charged with making a false statement on his 1992 return by reporting a false carry-over loss. On appeal, Chavin argued that the tax loss figure would have been lower if the district court had considered all of his legitimate business deductions which he mistakenly failed to claim on his return, plus that portion of the bad debt loss he had deducted which was legitimate. *Id.* at 676-677. Though noting the Second Circuit's decision in *Martinez-Rios*, the Seventh Circuit concluded that, under the post-1993 version of the guidelines, "tax loss" is defined as the "object of the offense" which, under the post-1993 amendments, specifically excludes consideration of unclaimed deductions under § 2T1.1. *Id.* at 678.

---

such information was not "available" because it was not at issue in the trial, and even if it was not offered at sentencing, the government bore the burden of proving tax loss at sentencing, citing *United States v. Montano*, 250 F.3d 709, 713 (9th Cir. 2001). It is not the government's or the court's responsibility to establish the defendants' itemized deductions, if no itemized deduction information was offered by the defendants. Using the standard deduction is a "reasonable estimate" given the "available facts." The district court's reliance on the government's tax loss calculations was not clearly erroneous. *See id.* at 714.

United States v. Bishop, 291 F.3d 1100, 1115-1116 (9th Cir. 2002).

In *United States v. Spencer*, 178 F.3d 1365, 1366 (10th Cir. 1999), part of the defendant's scheme to defraud the government was to divert a significant number of checks made payable to his companies to secret bank accounts under his control. *Id.* The diverted income was not reported either by the defendant or by his companies. *Id.* On appeal, the defendant argued that if the company had properly reported the income diverted to his private accounts, the company could have paid him the money legitimately in the form of executive compensation or bonuses. *Id.* at 1368. The Tenth Circuit disagreed, explaining that it did not read U.S.S.G. § 2T1.1(c), Note A, as "giving taxpayers a second opportunity to claim deductions after having been convicted of tax fraud." *Id.*

The Fourth Circuit in the Delfinos case adopted the position of the Seventh and Tenth Circuits and rejected the position of the Second Circuit:

> The Delfinos claim that the phrase "a more accurate determination of the tax loss" mandates the calculation of deductions before tax loss is determined. The three courts of appeals which have considered this issue have split, with a majority rejecting the position advanced by the Delfinos. Compare *Chavin*, 316 F.3d at 679 (rejecting the inclusion of deductions) and *United States v. Spencer*, 178 F.3d 1365, 1368 (10th Cir. 1999) (same) with *United States v. Gordon*, 291 F.3d 181, 187 (2d Cir. 2002) (concluding that § 2T1.1(c)(1)(A)

> requires the calculation of deductions). We agree with and adopt the majority view.

United States v. Delfino, 510 F.3d 468, 473 (4th Cir. 2007).

Given the recurring nature of this issue – over six hundred tax cases sentenced per year in the United States District Courts – certiorari should be granted to resolve this important conflict.

CONCLUSION

WHEREFORE, the Petitioners, **JAMES DOMINIC DELFINO** and **JEANIENE ANN DELFINO**, respectfully requests this Honorable Court grant this petition for certiorari to resolve the conflict in the circuits over the proper application of U.S.S.G. § 2T1.1 in determining tax loss.

Respectfully submitted,

THE LAW OFFICE OF
WILLIAM MALLORY KENT

WILLIAM MALLORY KENT
Florida Bar No. 0260738
1932 Perry Place
Jacksonville, Florida 32207
(904) 398-8000
(904) 348-3124 FAX
kent@willia nkent.com

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. JAMES DOMINIC DELFINO, *Defendant-Appellant.*	No. 06-4506

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. JEANIENE ANN DELFINO, *Defendant-Appellant.*	No. 06-4507

Appeals from the United States District Court
for the Eastern District of Virginia, at Richmond.
Robert E. Payne, District Judge.
(3:05-cr-00202-REP)

Argued: November 2, 2007

Decided: December 18, 2007

Before TRAXLER, SHEDD, and
DUNCAN, Circuit Judges.

Affirmed by published opinion. Judge Shedd wrote the opinion, in which Judge Traxler and Judge Duncan joined.

COUNSEL

ARGUED: William Mallory Kent, Jacksonville, Florida, for Appellants. Gregory Victor Davis, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Chuck Rosenberg, United States Attorney, Alexandria, Virginia; Alan Hechtkopf, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

OPINION

SHEDD, Circuit Judge:

James and Jeaniene Delfino appeal their convictions for tax evasion, mail fraud, and conspiracy to defraud the United States, alleging trial and sentencing errors. Finding no error, we affirm.

I

A grand jury returned a four-count superseding indictment charging the Delfinos with one count of conspiracy to defraud the United States in violation of 18 U.S.C. § 371; two counts of attempted evasion of payment of income tax in violation of 26 U.S.C.

§ 7201 and 18 U.S.C. § 2; and one count of mail fraud in violation of 18 U.S.C. § 1341. The case was tried to a jury.

At trial, the evidence tended to show that during the 1990s and 2000s, the Delfinos owned and operated several computer consulting firms which generated their personal income. However, for the years 1993 through 2004, the Delfinos did not file income tax returns. Instead, the Delfinos established several trusts in which they placed their incomes. These trusts likewise failed to file income tax returns or pay income taxes, and the Government alleged that the trusts were formed for the purpose of avoiding the payment of income taxes.

In 1997, the Internal Revenue Service ("IRS") began an audit of the Delfinos and their trusts, but the Delfinos refused to cooperate. As a result, the IRS calculated the Delfinos' income from bank records and prepared the Delfinos' tax returns for the years they had failed to do so. The IRS then assessed tax on the Delfinos' total income for those years without allowing any deductions which they could have claimed. This assessment formed the basis for the tax evasion and the conspiracy-to-defraud counts against the Delfinos.

The Delfinos sought to prove that they had relied in good faith on the advice of Royce McCarley, a trust promoter and self-described tax consultant. The Delfinos presented evidence that McCarley advised them how to structure their trusts, that their trusts

could be used to shift liability for income taxes, and that the use of these trusts was legal. Based on this testimony, the district court instructed the jury that it could consider the Delfinos' good-faith defense.

The jury found the Delfinos guilty on all counts. At sentencing, the Delfinos argued that the tax loss contained in the presentence report was erroneous because it did not credit them with the deductions which they could have claimed had they filed their tax returns. The district court rejected this argument and sentenced the Delfinos based on the tax loss calculated in the presentence report.

The Delfinos now appeal, arguing (1) the district court abused its discretion by refusing to admit testimony from six of McCarley's clients who participated in trust schemes similar to those at issue here; (2) there is insufficient evidence to sustain their mail fraud convictions; (3) venue was improper in the Eastern District of Virginia; and (4) the district court incorrectly calculated their tax loss. We consider each of these issues in turn.

II

The Delfinos first claim that the district court erred by excluding testimony from witnesses who would have testified regarding their participation in McCarley's schemes. The district court excluded this evidence because it found that certain of the witnesses did not participate in a scheme similar to that which the Delfinos claim to have participated in, thus

rendering the testimony of those witnesses irrelevant. The district court excluded the remaining witnesses because it found (1) that good-faith reliance is a purely subjective defense and that the testimony of other participants in McCarley's scheme was irrelevant to the Delfinos' own subjective good-faith beliefs and (2) that even if these witnesses were "marginally relevant" to the Delfinos' defense, their testimony would confuse the jury and constitute a waste of time because it would require a detailed discussion of each witness's participation in McCarley's schemes and therefore would essentially constitute a trial within a trial.

We review the district court's evidentiary rulings for abuse of discretion. *United States v. Hedgepeth,* 418 F.3d 411, 419 (4th Cir. 2005). A district court abuses its discretion when it acts arbitrarily or irrationally, fails to consider judicially recognized factors constraining its exercise of discretion, relies on erroneous factual or legal premises, or commits an error of law. *Id.*; *United States v. Williams,* 461 F.3d 441, 445 (4th Cir. 2006).

We hold that the district court acted within its discretion in excluding the participants in the McCarley scheme. A good-faith/reasonable reliance defense to tax evasion is provable based on a defendant's subjective beliefs. *Cheek v. United States,* 498 U.S. 192, 202 (1991). Accordingly, testimony from other participants in the McCarley scheme could be relevant, at most, to bolster the Delfinos' claim that they acted in good-faith reliance on McCarley's advice. Yet

the witnesses proffered by the Delfinos were not parties to the same McCarley presentations as the Delfinos, and the Delfinos had no contemporaneous knowledge that these other participants had acted on McCarley's advice. This being the case, the proffered testimony is not directly relevant to McCarley's provision of the advice to the Delfinos and their reliance thereon. Therefore, the district court did not abuse its discretion by excluding the evidence.

III

The Delfinos next argue that the Government failed to present sufficient evidence to sustain their mail fraud conviction. Specifically, the Delfinos contend that the Government did not adduce evidence that they used an interstate commercial carrier. In reviewing the sufficiency of the evidence, our role is limited to considering whether there is substantial evidence, taking the view most favorable to the Government, to support the conviction. *United States v. Beidler,* 110 F.3d 1064, 1067 (4th Cir. 1997). "[S]ubstantial evidence is evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *United States v. Burgos,* 94 F.3d 849, 862 (4th Cir. 1996) (en banc).

To obtain a conviction for mail fraud, the Government must prove (1) the existence of a scheme to defraud and (2) the use of the mails (or another interstate carrier) for the purpose of executing the

scheme. *United States v. Loayza,* 107 F.3d 257, 260 (4th Cir. 1997). The second element may be satisfied when a defendant causes the mails to be used by doing "an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended." *Pereira v. United States,* 347 U.S. 1, 8-9 (1954). Further, the use of the mails can be proven through evidence of business practice or office custom. *United States v. Scott,* 730 F.2d 143, 146-47 (4th Cir. 1984).

The Government contended that the Delfinos committed mail fraud when they received by mail a loan application from Countrywide Home Loans ("Countrywide") in Plano, Texas; fraudulently completed the application; and returned the same by commercial carrier to Countrywide. In support of its case, the Government called a Countrywide loan officer who testified that he had no direct knowledge of the receipt of the Delfinos' loan application and that he did not have direct knowledge as to whether it was received by mail or commercial carrier. However, he stated that Countrywide's normal business practice is to send the borrower a return United Parcel Service or Federal Express envelope, which the borrower then typically uses to return the application. He further testified that Countrywide likely has used other methods to transmit or receive loan application information including hand delivery or delivery by airplane or facsimile transmission.

We find this evidence sufficient to support the Delfinos' mail fraud conviction. The jury was entitled to believe and to rely on the testimony that Countrywide typically sends out a commercial carrier's return envelope, which the borrower typically uses to return the loan application. In relying on this testimony, the jury was entitled to conclude that the Delfinos likely returned their loan application by commercial carrier rather than the less likely, though possible, media of airplane, personal delivery, or facsimile transmission. *United States v. Hannigan,* 27 F.3d 890, 892-93 (3d Cir. 1994) ("Once evidence concerning office custom of mailing is presented, the prosecution need not affirmatively disprove every conceivable alternative theory as to how the specific correspondence was delivered."). We therefore affirm the Delfinos' conviction for mail fraud.

IV

Finally, the Delfinos assert that the district court erred in calculating their tax loss for purposes of sentencing by not subtracting from the amount of the loss any deductions they could have claimed for the years in question but did not claim due to their failure to file returns. We review de novo the legal question of whether the tax loss includes deductions. *United States v. Moreland,* 437 F.3d 424, 433 (4th Cir. 2006).

The sentencing guidelines define "tax loss" as: "the total amount of loss that was the object of the

offense (*i.e.*, the loss that would have resulted had the offense been successfully completed)." U.S.S.G. § 2T1.1(c)(1). In arguing that the district court erred in its interpretation of this provision, the Delfinos rely on *United States v. Schmidt,* 935 F.2d 1440 (4th Cir. 1991), where we held that it was error to disallow deductions a defendant could have taken under U.S.S.G. § 2T1.3(a) (1989), the then-applicable guideline for conspiracy to impair, impede, or defeat tax defined tax loss. We concluded that "a fair reading of § 2T1.3(a) supports . . . punishing a crime whose gravity is represented by the *actual* loss of tax revenue to the IRS." 935 F.2d at 1451 (emphasis added).

We believe we can no longer rely on *Schmidt's* interpretation of "tax loss" under the sentencing guidelines. When we decided *Schmidt,* the guidelines defined tax loss as "the greater of: (A) the total amount of tax that the taxpayer evaded or attempted to evade; and (B) the 'tax loss' defined in § 2T1.3." U.S.S.G. § 2T1.1(a) (1989). Section 2T1.3, in turn, defined tax loss as "28% of the amount by which the greater of gross income and taxable income was understated, plus 100% of the total amount of any false credits claimed." U.S.S.G. § 2T1.3(a) (1989). However, the Sentencing Commission amended the guidelines in 1993 by replacing the definition of "tax loss" on which we relied in *Schmidt* with the current definition found in § 2T1.1(c)(1). The current guideline refers to the "total amount of the loss that was the object of the offense (*i.e.*, the loss that would have resulted had the offense been successfully

completed)" rather than "the total amount of the tax that the taxpayer evaded or attempted to evade." The Sentencing Commission explained that it adopted this amendment so that a uniform definition of tax loss would "eliminate[ ] the anomaly of using actual tax loss in some cases and an amount that differs from actual tax loss in others." U.S.S.G. App. C, Amend. 491 (1993). By altering the language which *Schmidt* interpreted and on which it rested, this change in the sentencing guidelines supersedes our holding in *Schmidt*.

With *Schmidt* no longer binding on this point, we conclude that the phrase "object of the offense" means "the *attempted,* or *intended* loss, rather than the *actual* loss to the [G]overnment." *United States v. Chavin,* 316 F.3d 666, 677 (7th Cir. 2002) (emphasis in original). In other words, "the object of the offense" means the loss that would have resulted had a defendant been successful in his scheme to evade payment of tax. Thus, if the Delfinos' scheme had succeeded, the Government would have been deprived of the tax on the amount by which they underreported (or failed to report) their taxable income. This unpaid tax represents the intended loss to the Government. It was this amount which the district court properly used to calculate the tax loss for purposes of sentencing.

The Delfinos next look to U.S.S.G. § 2T1.1(c)(2)(A) for relief.[1] Section 2T1.1(c)(2)(A) provides:

> If the offense involved failure to file a tax return, the tax loss shall be treated as equal to 20% of the gross income . . . less any tax withheld or otherwise paid, unless a more accurate determination of the tax loss can be made.

The Delfinos claim that the phrase "a more accurate determination of the tax loss" mandates the calculation of deductions before tax loss is determined. The three courts of appeals which have considered this issue have split, with a majority rejecting the position advanced by the Delfinos. *Compare Chavin,* 316 F.3d at 679 (rejecting the inclusion of deductions) *and United States v. Spencer,* 178 F.3d 1365, 1368 (10th Cir. 1999) (same) *with United States v. Gordon,* 291 F.3d 181, 187 (2d Cir. 2002) (concluding that § 2T1.1(c)(1)(A) requires the calculation of deductions). We agree with and adopt the majority view.

---

[1] The Government asserts that the Delfinos' reliance on § 2T1.1(c)(2)(A) is misplaced because the Delfinos were sentenced under § 2T1.1(c)(1) (tax evasion) rather than § 2T1.1(c)(2)(A) (failure to file a tax return). While that the Delfinos were, indeed, convicted of tax evasion, § 2T1.1(c)(2)(A) at least arguably applies because the Delfinos' conduct did include "failure to file a tax return." We therefore consider the Delfinos' argument that § 2T1.1(c)(2)(A) entitles them to resentencing.

In *Spencer,* the Tenth Circuit stated:

> The sentencing guidelines simply authorize a court to avoid the presumptive tax *rates* if a "more accurate determination of the tax loss can be made." We do not interpret this provision as giving taxpayers a second opportunity to claim deductions after having been convicted of tax fraud. It must be remembered that, in tax loss calculations under the sentencing guidelines, we are not computing an individual's tax liability as is done in a traditional audit. Rather, we are merely assessing the tax loss resulting from the manner in which the defendant chose to complete his income tax returns.

178 F.3d at 1368 (emphasis added) (internal citations omitted). We find this reasoning persuasive. The Delfinos chose not to file their income tax returns. They also chose not to cooperate with the initial IRS audit, at which time they could have claimed deductions to which they were entitled. By doing so, they forfeited the opportunity to claim these deductions. Were the district court now to attempt to reconstruct the Delfinos' income tax returns *post hoc,* it would be forced to speculate as to what deductions they would have claimed and what deductions would have been allowed. This would place the court in a position of considering the many "hypothetical ways" that the Delfinos could have completed their tax returns. *Chavin,* 316 F.3d at 678. The law simply does not require the district court to engage in this speculation, nor does it entitle the Delfinos to the benefit of

deductions they might have claimed now that they stand convicted of tax evasion.

V

Based on the foregoing, we affirm the Delfinos' convictions and sentences.[2]

AFFIRMED.

[2] The Delfinos also contend that the Government failed to establish venue in the Eastern District of Virginia. Because the Delfinos' improper venue claim was raised in their post-trial motion for judgment of acquittal and/or new trial, we conclude that it was untimely and that the claim is waived. *See United States v. Ebersole,* 411 F.3d 517, 528 (4th Cir. 2005); *United States v. Collins,* 372 F.3d 629, 633 (4th Cir. 2004).

FILED: January 15, 2008

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 06-4506 (L)
(3:05-cr-00202-REP)

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JAMES DOMINIC DELFINO,

Defendant-Appellant

ORDER

The Court denies the petition for rehearing and rehearing en banc. No poll was requested on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Traxler, Judge Shedd, and Judge Duncan.

For the Court

/s/ Patricia S. Connor, Clerk